No. 82-1213

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Supreme Court of the United States

October Term, 1983

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

BENJAMIN QUARLES,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT

Steven J. Hyman
Attorney for Respondent
Hyman & Miner
24 East 21st Street
New York, New York 10010
(212) 777-8200

Wayne Brody
Of Counsel

QUESTIONS PRESENTED

1. Whether the courts below properly found that the question "where's the gun?", in the circumstances of the instant case, was a custodial interrogation impermissible in the absence of prior Miranda warnings.

2. Whether questions of the admissibility of evidence derived from the primary illegality are properly before this Court.

3. Whether the courts below properly suppressed the derivative evidence herein.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 82-1213

THE PEOPLE OF THE STATE OF
NEW YORK, PETITIONER

v.

BENJAMIN QUARLES

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE
STATE OF NEW YORK

BRIEF FOR RESPONDENT

STATEMENT OF CASE

Facts

At 12:30 a.m., on the 11th of September, 1980, Officer Kraft and his partner were on radio patrol in Queens when they were approached by a woman who said that she had been raped. She told the officers that her assailant

was in a nearby supermarket and that he had a gun (16a).[1] The officers drove up the block to the store and informed the precinct that they were in search of an armed perpetrator at that location (24a). At least two patrol cars came to their assistance, and there were at least four officers on the scene before the arresting officer entered the store (25a). At first the officer saw only a clerk, and then observed the respondent as he was carrying some groceries towards the checkout counter (17a, 25a-26a). The respondent then turned and ran up the aisle toward the rear of the store (28a). The officers entered the store and followed him (17a, 28a-29a).

Officer Kraft and his partner had their weapons drawn (31a). At the back of the store the officers converged on respondent and "in essence

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1 All references are to the Joint Appendix unless otherwise indicated.

surrounded him". Officer Kraft "told him to stop, put his hands over his head" (31a). The respondent stood still, hands raised, surrounded by police with drawn weapons. The arresting officer "moved right next to the defendant", holstered his revolver, and frisked him, without saying a word (32a-33a). On conducting a thorough frisk of the respondent, the officer discovered an empty shoulder holster and nothing more. After the frisk was completed, the respondent's hands were cuffed behind his back (33a). Once the respondent was handcuffed, none of the officers who surrounded respondent had their weapons drawn. According to the arresting officer, they had the situation "definitely" under control (35a).

Speaking for the first time since he had ordered the respondent to halt, the officer "then asked the defendant where the gun was" (33a-34a, 35a- 36a). Looking in the direction of a stack of cartons the respondent

replied "the gun is over there" (34a). The officer went over to the stack, reached his hand into the carton indicated and "found a gun" (35a).

The officer then told the respondent he was under arrest, and read him the Miranda warnings from a pre-printed paper (18a-21a). As to each of the four warnings the respondent was asked whether he understood. The respondent replied that he did understand as to the right to remain silent and the right to have counsel present. The respondent merely shook his head (yes) in response to whether or not he understood that his statements might be used against him. He made no response at all to the question as to whether or not he understood the right to have an attorney provided if he could not afford one, and when asked whether or not he understood that if he had an attorney available he could remain silent until he was able to consult with him the respondent gave "no

answer, no remarks whatever" (20a). He answered "yes" to the question "are you willing to answer any questions without an attorney present?". The officer then asked the respondent whether he owned the gun, and the respondent said he did. To the officer's question of where the gun was bought, the respondent answered "Miami, Florida" (21a). The officer then took respondent to the station house where he was booked and was asked his "pedigree for the arrest report" (21a-22a).

Proceedings Below

Respondent was indicted in the Supreme Court, State of New York, County of Queens, on a single charge of criminal possession of a weapon in the third degree (§265.03 of the Penal Law)(3a).[2]

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2 Respondent was originally arrested and charged in the lower court with rape and possession of a weapon but only the latter charge was pursued.

Respondent made timely motion pursuant to §710.20 of the Criminal Procedure Law to suppress the admissions made by him and the weapon seized (4a-5a). He alleged that the admissions were obtained in violation of his constitutional rights, CPL §710.20(3) and CPL §60.45(2)(b), and that the weapon was seized as a result of the illegally obtained admission, CPL §710.20 (1) and (4). The petitioner objected to the hearing (9a), but the court ordered what it called a pre-trial Huntley and Mapp hearing (12a-13a).

Only Officer Kraft testified at the hearing (14a-38a). At the conclusion of the hearing, respondent's counsel asked for time to submit a memorandum with respect to the Miranda issue because respondent was not advised of his rights at the appropriate time and "so if the statement falls, then so does the gun..." (37a). The assistant district attorney stated he "may or may not

want to put in a memorandum depending on what Mr. Hyman [counsel for respondent] has to say" (id). Thereafter, respondent filed a brief. None was filed by petitioner (39a-40a).[3]

A decision was rendered by Justice Ferraro suppressing respondent's initial statement, the gun and respondent's subsequent statements. Justice Ferraro held:

> Later cases have held a police officer may ask questions under the Stop and Frisk rule where justified by reasonable suspicion or to protect officers safety (cites omitted). Here the police by handcuffing the defendant had in effect arrested the defendant.

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3 In the printing of the record, petitioner inadvertently put the papers submitted by respondent as "reply" papers (40a). However, the original order correctly shows that the notice of motion and affidavits were filed by respondent and no papers were filed by petitioner.

> He was now entitled to the Miranda warnings before any questioning as the police had reasonable cause to arrest and the officers' safety was not in question. (43a).

The original statements and gun were therefore suppressed. The subsequent statements were suppressed upon the finding that they were derived from the primary illegality since the improperly obtained admissions let "the cat out of the bag", and the subsequent statements were made within minutes of finding the gun (44a). The court never considered or was asked to consider the good faith of the officer, whether the original statement could be suppressed and the non-testimonial derivative evidence admitted, or whether the weapon would have been "inevitably discovered".

An appeal was then taken to the Appellate Division. For the first time, the petitioner raised a question with regard to "inevitable discovery" (Pet.Br.5). Respondent opposed this argument on the grounds that the issue

was not preserved. No other argument was advanced by petitioner with respect to the exclusionary rule or the admissibility of the derivative evidence. The Appellate Division affirmed without opinion.

Leave was then granted for appeal to the Court of Appeals. Upon that appeal, petitioner and respondent asserted the same arguments that were made in the Appellate Division (id. at 5). The majority of the Court of Appeals affirmed, in a memorandum opinion ruling which held that at the time the respondent was asked the question:

> He was surrounded by four police officers whose guns had been returned to their holsters because, as Officer Kraft testified 'the situation was under control'. Nothing suggests that any of the officers was, by that time, concerned for his own physical safety. (52a)

The court agreed that the statement and the gun were properly suppressed and that the subsequent statements made only minutes later, were tainted

by the pre-warning statement and the seizure of the gun. The court declined to consider an "emergency exception" argument because no evidence of such circumstance was in the record and the issue was not preserved below (52a). The court distinguished two other New York cases which had permitted questions without warnings as inapposite (53a). The dissent argued that neither the letter nor spirit of Miranda was violated (55a). Judge Wachtler discussed officer safety and noted, "[m]ore significantly", that the danger to the public was a sufficient non-investigative purpose for questioning respondent about the location of a weapon in the absence of warnings. Neither the majority nor the dissent discussed inevitable discovery (57a). The petitioner then sought review in this Court.

SUMMARY OF ARGUMENT

Under Miranda v Arizona, 384 U.S. 436 (1966), an individual who has

been taken into custody must be given certain warnings to protect his Fifth Amendment rights before he is subjected to questioning. In this case, where respondent had been frisked and handcuffed and the arresting officer conceded that the situation was "definitely" under control, the question, "where's the gun?" constituted custodial interrogation.

Under the objective tests this Court has established in cases such as Orozco v Texas, 394 U.S. 324 (1969) and Rhode Island v Innis, 446 U.S. 291 (1980), respondent met the two prongs of Miranda necessary to come within its protection. He was in custody in that he was not free to leave, and he was restrained to the degree associated with formal arrest. The question asked by Officer Kraft was an express question reasonably likely to elicit an incriminating response and could not be regarded as a routine administrative question. Although petitioner argues that "exigent circumstances" or "officer safety"

justifies not giving the Miranda warnings, the record does not support any such emergency. The argument of amicus that police may question suspects incident to arrest even after they have been taken into custody, is without legal support and would upset the objective standards established by this court to insure that the police in the field have clear guidelines on when Miranda is to apply.

Petitioner argues for the first time in this Court, that Miranda does not require that derivative evidence be excluded. Neither Michigan v Tucker, 417 U.S. 433 (1974) nor the doctrine of inevitable discovery, support such a ruling in this case. Nor have the issues been preserved for review. While it is now urged that Officer Kraft's good faith and the lack of actual coercion do not warrant exclusion of the gun, the New York courts were never called upon to consider these issues, and no appropriate record was developed. Under

Illinois v Gates, U.S. , 103 S.Ct. 2317 (1983) such questions should not now be considered by this Court. In addition, the exclusion of derivative evidence was based on state law in that the New York statutory scheme provides for the exclusion of evidence independent of federal law, and no federal exclusionary rule was invoked or cited.

The narrow holding of Michigan v Tucker, supra, does not apply to the facts of this case. Exclusion of the derivative evidence is necessary to further the purposes of Miranda and to protect respondent's rights under the Fifth Amendment. Evidence which is derived solely from a tainted confession should not be received in evidence.

The doctrine of inevitable discovery does not apply in this case. Petitioner failed to preserve the issue for appeal because it was not timely raised. The New York appellate courts refused to hear petitioner's

argument and rejected it sub silentio. The failure of petitioner to preserve the issue deprives this Court of jurisdiction. Even if this Court considers the inevitable discovery doctrine, it should not be applied in this case, where no facts were adduced as to the likelihood of the recovery of the weapon and no determination was made by the New York courts as to the burden necessary to overcome the presumption of inadmissibility of the evidence. Under amicus' own argument in Nix v Williams, 82-1651 the necessary facts and proof were not adduced in this case to permit application of the octrine.

POINT I

RESPONDENT WAS ENTITLED TO BE ADVISED OF HIS CONSTITUTIONAL RIGHTS AFTER HE WAS TAKEN INTO CUSTODY AND BEFORE HE WAS QUESTIONED BY THE POLICE

Respondent's privilege against self-incrimination was infringed when Officer Kraft questioned him as to the location of a weapon. Respondent did not knowingly waive his Fifth Amendment rights when he responded to the inquiry because he had not been advised of those rights as mandated by Miranda v Arizona, supra. At the time of the question, respondent had been frisked and found to be unarmed; his hands had been cuffed behind his back and he was surrounded by at least four officers. Officer Kraft acknowledged that at the time he asked the question the situation was "definitely" under control. The question therefore constituted custodial interrogation as that term has been defined by this Court.

In Miranda this Court ennunciated procedural safeguards to protect a

suspect's Fifth Amendment rights when being questioned by the police. The Court required that when "...an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning" the now familiar pre-interrogation warnings be given. (344 U.S. at 478.) Since Miranda, this Court has emphasized that warnings are required in every instance of in custody interrogation. Johnson, v New Jersey, 384 U.S. 719, 730 (1966); Michigan v Payne, 412 U.S. 47, 54 (1973)

The critical questions that are presented in assessing whether Miranda protections are required are whether the suspect was in custody and, if so whether the suspect was subjected to questioning. It is precisely this two-pronged approach which the New York courts followed in determining that respondent was entitled to the warnings. Both the lower court and the majority in the Court of Appeals focused on whether respondent was in

custody and whether the question "where's the gun?" constituted interrogation. The New York courts affirmative determination on both issues is consistent with the record and this Court's interpretations of the relevant terms.

Petitioner and amicus urge this Court to redefine custody and interrogation and to establish new criteria for determining when Miranda is to apply. While petitioner acknowledges that respondent was in custody for purposes of Miranda (Pet. Br. 11), it seeks to establish new exceptions to Miranda where officer or public safety is involved. Amicus, on the other hand, suggests an extraordinary new theory which would permit "in custody" questioning if it is "incident to arrest". This new standard for evaluating whether Fifth Amendment rights of a seized suspect are jeopardized changes the focus of Miranda radically and ignores the clear guidelines heretofore established.

In Rhode Island v Innis, 446 U.S. 291 (1980), the Chief Justice described succinctly the state of the law with regard to Miranda:

> The meaning of Miranda has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule Miranda, disparage it nor extend it at this late date. (466 U.S. 304.)(Burger, C.J. concurring.)

Justice Burger further cautioned against introducing "new elements of uncertainty" with regard to the application of Miranda (id.). The contentions of both petitioner and amicus, if adopted, will introduce such uncertainty and disrupt the clarity that now exists.

It has been noted that one of the "core virtues" of Miranda is the rigidity and precision with which it is applied. Fare v Michael C., 439 U.S. 1310, 1314 (1978) (Rehnquist, J. on application for stay). See also, Fare v Michael C., 442 U.S. 707 (1979) and California v Prysock, 453 U.S. 355 (1981). As the Court of Appeals for

the Fifth Circuit stated in Harryman v Estelle, 616 F.2d 870, 873-874 (5th Cir. 1980) (en banc) cert. den. 449 U.S. 860:

> The rigidity of the Miranda rules and the way in which they are to be applied was conceived of and continues to be recognized as the decision's greatest strength. [cites omitted] The decision's rigidity has afforded police clear guidance on the acceptable manner of questioning an accused. It has allowed courts to avoid the intractable factual determinations that the former totality of the circumstances approach often entailed. When a law enforcement officer asks a question of an accused and the accused, without the benefit of Miranda's safeguards, answers, the totality of the circumstances is irrelevant. The accused's answer is simply inadmissible at trial as part of the prosecution's case in chief.

It is against these standards of certainty and rigidity, and the resultant clear guidance to law enforcement officials, that the theories of petitioner and amicus should be evaluated. Adherence to these standards will be furthered by a

finding that respondent was subjected to in custody questioning and thereby entitled to Miranda warnings.

A. Respondent Was In Custody For Purposes of Miranda

Petitioner concedes this prong of the test. In its brief, it states:

> There can be little doubt that when the police surrounded and handcuffed the defendant he was in custody within the meaning of Miranda. (Pet. Br. 11)

The record clearly substantiates this concession. The hearing court found that the police had probable cause to arrest respondent, that they apprehended him with drawn guns, that respondent was searched and handcuffed and that the police had "...in effect arrested the [respondent]" (43a). The New York Court of Appeals agreed.

Amicus ignores the petitioner's concession and seeks to distinguish between custody at the time of the initial seizure and custody after the "completed arrest", though the distinction is not supported by the

record or the definition of custody employed by this Court.[4] In Orozco v Texas, 394 U.S. 324, 325 (1969), this Court held that where four policemen entered a suspect's bedroom and questioned him about the location of a weapon, Miranda warnings were required because the individual was "not free to go where he pleased but was 'under arrest'". The opinion of the court did not attempt to parse "custody", nor did it ever suggest that the warnings applied only after the arrest was completed. The subsequent decisions of this Court have not altered the holding in

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4 While amicus argues that the arrest was not completed for purposes of Miranda, it does not contest that at the time of the questioning about the weapon respondent was under arrest. In fact, the very exception it proposes is for questioning "incident to arrest".

Orozco. In Oregon v Mathiason, 429 U.S. 492 (1977), and Beckwith v United States, 425 U.S. 341 (1976), the majority, while declining to apply Miranda, continued to emphasize that Miranda warnings are required when a suspect is not free to leave.

Recently, the court rejected evaluation of custody based upon an assessment of the "totality of the circumstances". In a per curiam opinion, the majority in California v Beheler, ___U.S.___, 103 S.Ct. 3517 (1983) admonished that:

> Although the circumstances of each case must certainly influence a determination of whether a suspect is in custody for purposes of receiving of Miranda protection, the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. (at 3519-3520)

The "simple" inquiry required by Beheler was made in this case, and the New York courts accordingly found "custody" for Miranda purposes. Amicus' argument with respect to the difficulty of defining custody is

unfounded. Where indicia of arrest are present, such as drawn weapons or handcuffs, then custody clearly exists. See generally, Dunaway v New York, 442 U.S. 200 (1979); United States v Mendenhall, 446 U.S. 544, 554 (1980) (Stewart, J); United States v Jiminez, 602 F.2d 139 (7th Cir. 1979); United States v Lara, 638 F.2d 892 (5th Cir. 1981). Further inquiry is not required. Where there is restraint equivalent to arrest Miranda attaches.[5]

The point at which Miranda warnings are to be given has never been in dispute. As Justice Powell noted in Doyle v Ohio, 426 U.S. 610, 617 (1976), Miranda requires that "a person taken into custody be advised immediately..." of his rights. In any event, the critical issue is not when

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5 Mr. Justice White, in his dissent in Orozco noted that "once arrest occurs, the application of Miranda is automatic. (394 U.S. at 329)

in the arrest process warnings are given but only that they be given prior to interrogation.

Amicus suggests that even where arrest has occurred in the Fourth Amendment context, custody has not been effectuated for Fifth Amendment purposes. While such circumstances could conceivably be hypothesized it is more likely that "seizure under the fourth amendment [will be] quite similar to the determination of 'custody' triggering rights under the Fifth Amendment". Moore v Ballone, 658 F.2d 218, 226-7 (4th Cir. 1981). In any event, there can be no basis for distinguishing between varieties of custody in this case. Clearly, as the courts below found, respondent's seizure was custody for purposes of the Fifth Amendment and Miranda.

B. Respondent Was Subjected To Custodial Interrogation When He Was Asked "Where's The Gun?"

1. The question "where's the gun?" was an express question which the officer knew or should have known

was reasonably likely to elicit an incriminating response. Under Miranda, respondent had to be advised of his rights before he was subjected to such questioning. As this Court held in Rhode Island v Innis:

> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. (446 U.S at 300)

In this context Justice Stewart then proceeded to define "interrogation" as including express questioning and:

> ...any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. (446 U.S. at 301)(footnotes omitted)

Petitioner seeks to use the reference in Innis to questions "normally attendant to arrest and custody" as a means of circumventing Miranda in this case by suggesting that the question "where's the gun?" is "normally atten-

dant".[6] Petitioner's argument, however, misconstrues the scope of the words or actions by the police which were intended by this Court not to be interrogation under Miranda.

First, petitioner's proposed expansion of "normally attendant" would directly overrule Orozco v Texas, where this Court explicitly held that when a question about the location of a weapon was not preceded by the required warnings, use of the admissions obtained was a "flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in Miranda" (395 U.S. at 326). Neither the majority nor the dissent in Orozco ever intimated that a question to a suspect at the scene of the arrest

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6 Petitioner cites United States v Bennett, 626 F.2d 1309 (5th Cir. 1980) cert. den. 449 U.S. 1092. However, in Bennett there was neither questioning nor its functional equivalent.

about the location of a weapon was not covered by Miranda because it was "normally attendant to arrest and custody". In addition, Innis itself dealt with the location of a weapon, and a conclusion that inquiry in that area would be "normally attendant" would render the Court's discussion of interrogation in Innis merely dicta.

Further, this Court has never suggested that the exempt area of questioning should extend to such obviously incriminating questions as the one at issue here. Even amicus does not urge this Court to permit the question asked by Officer Kraft under a "normally attendant to arrest and custody" exception. Rather it acknowledges that "normally attendant to arrest and custody" is intended to encompass "routine administrative questioning". (Am. Br. 12).

Routine administrative questioning has been recognized to be outside the protective area of Miranda in light of its non-investigatory purpose and the nature of the response likely to be

elicited. Thus, the courts have generally permitted questions related to the booking process to be asked without pre-interrogation warnings. See, e.g, United States v Menichino, 497 F.2d 935 (5th Cir. 1974); United States ex rel Hines v La Vallee, 521 F.2d 1109 (2d Cir. 1975) cert. den. 423 U.S. 1090; United States v Prewitt, 553 F.2d 1082 (7th Cir. 1977) cert. den. 434 U.S. 840; United States v Foskey, 636 F.2d 517 (D.C. Cir. 1980); United States v Hinckley, 525 F.Supp. 1342, 1356 n.8 (D.C. 1981) aff'd 672 F.2d 115 (D.C. Cir. 1982); compare Proctor v United States, 404 F.2d 819 (D.C. Cir. 1968). See also Note, The Applicability of Miranda to the Police Booking Process, 1976 Duke L.J. 574; Smith, The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?, 25 South Carolina L.R. 699, 704 (1974). As these cases and commentaries make clear the questions permitted as attendant to arrest and custody are strictly limited to those

which elicit information necessary to identify and process a suspect. As the court in United States ex rel. Hines v La Vallee, supra, observed:

> We recognize that this exception to Miranda lends itself to the possibility of abuse by police who might, under the guise of seeking pedigree data, elicit an incriminating statement. However, as long as the exception is limited to simple identification information of the most basic sort (e.g., name, address, marital status) the risk is minimal. (521 F.2d at 1113, n.2)

Administrative inquiries, such as the request to submit to blood-alcohol tests or fingerprinting, may also be permissible where they are uniformly requested of all suspects and "highly regulated by state law" Neville v South Dakota, ___ U.S.___ 103 S.Ct. 916, 923 n.15 (1983). Such inquiries are routine and non-investigatory and the request to take a test or submit to a physical analysis does not jeopardize a suspect's right against

self-incrimination. See, Arenella, Schmerber and the Privilege Against Self-Incrimination: A Reappraisal, 20 Am.Crim. L.R. 31, 56-58 (1982).

Permitting such administrative questions does not extend the "attendant to arrest and custody" language to areas that are obviously likely to elicit evidence of criminal activity from a suspect in custody. The distinction between interrogation and routine administrative inquiry is readily defined by the very test suggested by the plurality opinion in Innis. If the question is reasonably likely to elicit an incriminating response, then it falls within the purview of Miranda and warnings must be given, Harryman v Estelle, supra; United States v Downing, 665 F.2d 404 (1st Cir. 1981).

Whether or not Officer Kraft had non-investigatory motives cannot be discerned from this record, and is, under Innis, irrelevant. Using the objective test set forth in Innis, it is evident that the respondent's

response had to be potentially incriminating. See, White, Interrogation Without Questions, 78 Mich. L.Rev. 1209, 1228-1236 (1980). The question asked by Officer Kraft was not routine or administrative. It was investigatory in nature and reasonably likely to elicit an incriminating response. The import of the question was to have respondent locate evidence, a gun, which would be used in criminal proceedings against him. Since respondent was in custody at the time of the question, his privilege against self-incrimination was jeopardized unless he was given the procedural safeguards required by Miranda.

The proposed exemption from the meaning and scope of "interrogation", of questions such as "where's the gun?" would require that a variety of new factual inquiries be made. The objective tests for custody and interrogation so carefully set up by this Court would be upset. Judge Wachtler, in his dissent to the Court

of Appeals' opinion, suggests that questions which are "official conduct designed to achieve an articulable and legitimate non-investigatory purpose" (56a) are outside of the scope of "interrogation" as defined by this Court.[7]

Such distinctions would necessarily lead to a case by case evaluation of the totality of circumstances and the "intractable factual inquiries" that this Court has sought to avoid. They would open an area of uncertainty focused on the subjective intent of the interrogator. This would constitute a serious erosion of the

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7 Judge Wachtler himself cannot isolate the particular factor that would exempt a question as non-investigatory. He suggests officer safety as the basis for exempting the question "where's the gun?", but notes, "more significantly", that the question should be exempt because of the danger posed the general public (57a).

underlying principles established by this Court in Miranda, Orozco, and Innis.

2. Petitioner argues that even if the question "where's the gun?" constituted interrogation, the question should nevertheless not require Miranda warnings by reason of proposed exceptions for "officer safety" and "exigent circumstances". Essentially, petitioner argues that danger to the officer and/or the general public justifies an exception to the Miranda rule. While such a theory may be appropriate under certain circumstances, the record in this case does not give rise to any such exception.

As the New York courts expressly found, there was no threat to the safety of the arresting officers at the time of the interrogation. Respondent was apprehended away from the scene of the alleged crime by at least four policemen with drawn weapons; he was frisked and found to be unarmed. Respondent was then handcuffed and the officers surroundering

respondent holstered their weapons since, according to Officer Kraft, the situation was "definitely" under control. No actual or potential accomplice was alleged or claimed to be present. The respondent and the officers were alone at the scene of the arrest. By the time Officer Kraft posed the question to respondent he had been "reduced to a condition of physical powerlessness" (53a) and was totally within the control of the police. Had the officers any reason to fear for their safety, any of them could have immediately removed respondent from the scene. Pespondent's arrest had been effectuated and as the hearing court found, the "officers safety was not in question" (43a).

The difference between the facts established in this record and those in the cases cited by petitioner in support of its position is significant. Lack of physical restraint of

the suspect; i.e. United States v Castellana, 414 F.2d 325 (5th cir. 1974), State v Heath, 122 Ariz. 6. (Ariz. App. 1979), or clarification at the crime scene before effectuating an arrest; State v Levy, 229 So.2d 220 (La. 1979), Pope v State, 478 P2d 801 (S.C. Alaska 1977); or actual and imminent danger, Tucker v State, 237 Ga. 73 (1976), People v Riddle, 83 Cal. App.3d 563 (2d Dist. 1978) cert. den. 440 U.S. 937; may justify a different result.

The majority in the New York Court of Appeals recognized the significance of these factors in distinguishing this case from the two New York cases where questioning without Miranda warning was permitted (53a). In People v Huffman, 41 N.Y.2d 29 (1976), the question "what are you doing here?" was permitted when police inadvertently came upon a crime in progress and attempted to clarify the situation, while in People v Chestnut, 51 N.Y.2d 14 (1980), the question "where is the gun?" was permitted when

police came upon a suspect who was probably armed and had not yet been frisked or restrained.

Clearly, if concern for the safety of the officer is to override the rights traditionally accorded the suspect, then the basis for such action should be supported in the record. It would be inappropriate to establish the broad exceptions petitioner urges on a record where the officer states the situation was under control, and the facts support no other conclusion. The officer's search for the weapon was, as the New York courts found, not related to officer safety since it occurred after the respondent had been secured and arrested. As in Orozco v Texas, where safety was not found to be a factor, the question "where's the gun?" had to be preceded by Miranda warnings.

Petitioner also suggests that public safety or exigent circumstances justified the question by Officer Kraft. However, as the Court of

Appeals correctly points out:

> there is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety or that the police interrogation was prompted any such concern. (52a)

The question of whether public "safety" provides an exception to the Miranda rule was not preserved for review under New York law. The Court of Appeals held that no such theory was advanced at the suppression hearing and that therefore no factual determination was or could be made with regard to it (52a). Under Webb v Webb, 451 U.S. 493 (1981), the argument is therefore not available to petitioner in this Court [8]

The search for a weapon by law enforcement officials because of a generalized concern for the public welfare cannot override an individual's right against self-incrimination. Rhode Island v Innis, supra, involved the location of a

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[8] See discussion POINT IV, at pp. 77-81.

shotgun disposed of near a school for handicapped children. This Court, though it commented on the laudable motives of the officers in their efforts to locate the weapon, (446 U.S. at 302), did not find that such public safety considerations reduced the scope of Miranda. The speculative danger that petitioner posits in this case cannot be the basis for custodial interrogation without benefit of Miranda warnings.

The proposed public safety exception would "swallow the rule". The public safety concerns expressed by petitioner have no boundaries in time or place. The question can be asked at arrest, in the stationhouse or even in court. It can encompass a multitude of possible dangers both real and hypothetical. Such an exception offers no objective standard for the police officer in the field and in the end may not be an exception to Miranda but an abnegation of it.

C. The Incident To Arrest Rationale Is Inappropriate In The Miranda Context

Amicus urges this Court to carve out an area of questioning exempt from the protection of Miranda as "incident to arrest". The rationale offered by amicus in support of such a proposition is that the coercive environment of an arrest is different than that which was envisioned in the stationhouse investigation covered by Miranda (Am. Br. 14-19). Yet this very argument has been previously rejected by this Court.

In Orozco v Texas, this Court "put beyond doubt" that Miranda applies to the arrest scene as well as the stationhouse. United States v Hall, 421 F.2d 540, 544 (2d Cir. 1969) cert. den. 399 U.S. 990 (1970); See also, White, supra, 78 Michigan L.R. at 1221 n.98. Since Orozco this Court has continued to emphasize that the critical questions remain "custody" and "interrogation" and not the location of the interrogation (Oregon v

Mathiason, supra and California v Beheler, supra) or its purpose (Beckwith v United States, supra). Amicus' argument that the degree of coercion inherent in one place rather than another should be a significant factor in the application of Miranda, simply disregards the state of the law and the purpose of the rule.

The "incident to arrest" theory fails to meet two other aspects of Miranda. First, it ignores the very premise of Miranda, that in custody questioning, wherever it takes place, is presumed coercive unless the warnings are given. See, Johnson v New Jersey, supra. Amicus' theory appears to require that an individual establish that any response he made at the time of arrest was involuntary and the result of subjection to a coercive atmosphere. Not only does this argument impermissibly shift the burden back to the defendant, but it also requires the case by case analysis that Miranda specifically ruled out.

Second, the "incident to arrest" rationale offers no "objectively defined pressure point", United States v Henry, 447 U.S. 264, 283 n.6, (1980), (Blackman, J. dissent), or "trigger" where compelled interrogation is presumed to take place unless Miranda rights are given. Amicus concedes that respondent was placed under arrest and handcuffed, yet contends that the arrest was not complete and therefore questioning related to the arrest in time or subject matter is permissible. Amicus, offers no clear definition of when the arrest is "complete" or what questions are to be permitted. Indeed, amicus argues that the "clarity of the Miranda rules" should not be "overstated" (Am. Br. 11) and that police officers such as Officer Kraft will "intuitively" distinguish between questioning incident to arrest and investigative questioning (id. at 13). As set forth above, such arguments are inconsistent with the state of the law. The proposed

"incident to arrest" exception would return the law to the very confusion out of which Miranda, Orozco, and Innis arose and which the Court has sought, successfully, to avoid.

Amicus also raises the spectre that the decision below in this case will have "mischevious consequences" in cases dealing with investigative stops under Terry v Ohio, 392 U.S. 1 (1968). Such concern is misplaced. This case does not involve the thorny problem of defining when a stop without probable cause becomes a seizure under the Fourth Amendment. See United States v Mendenhall, supra; Florida v Royer, 445 U.S. 986 (1983) and United States v Place, ___ U.S.___ 103 S.Ct. 2637 (1983). In this case, no such problem exists. Both the parties and the courts below agree that when respondent was stopped he was subjected to arrest. Having been seized to the "degree associated with a formal arrest" and there being no dispute as to the probable cause for such arrest, the question of the scope

of a Terry stop under Miranda is not before this Court. Nor does this case involve the scope of general on-the-scene questioning permitted under Miranda, as amicus seems to argue. While police may conduct such questioning of other persons, they may not do so of the person taken into custody. Schneckloth v Bustamonte, 412 U.S. 218, 232, 239-240, n.29, (1973).

The decision of this Court in Miranda constituted clear guidance to the courts and to law enforcement officials as to the steps which must be taken to protect the constitutional rights of those in police custody. Each of the decisions of this Court following Miranda has served to clarify and resolve outstanding issues regarding the application of those protections without substantially altering the fundamental scope of that decision or its threshold determination - custodial interrogation.

To affirm the decision of the Court of Appeals herein is to reaffirm

the simple principle that has guided law enforcement with respect to the rights of defendants at the time of arrest for the past seventeen years; an individual in custody must be advised of his constitutional right not to incriminate himself before he is led to do so. Each of the grounds open which this Court has been urged to reverse the decision below would upon areas of uncertainty and questions of application of the Miranda principle which cannot be resolved by reference to the facts of the instant case and would imperil the uniform protection now afforded under Miranda.

POINT II

THE ISSUE OF THE ADMISSIBILITY OF THE DERIVATIVE EVIDENCE IS NOT PROPERLY BEFORE THIS COURT

The issue of whether the derivative evidence[9] is admissible, even if the initial statement is excluded was not preserved for consi- deration by this Court.[10] At no time in the state court proceedings did petitioner argue that the fruits of the improperly elicited admission should be admitted, or that the good

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9 Petitioner argues that both the gun and the subsequent statement should be admitted, while amicus limits its argument to the gun itself.

10 Both petitioner and amicus rely on Michigan v Tucker, 417 U.S. 433 (1974) in urging reversal of the Court of Appeals on the issue of exclusion. Both argue as well that the gun should be admitted on the basis of the "inevitable discovery" doctrine, which is discussed herein at Point IV, infra.

faith of the officer required modification of the exclusionary rule. Further, a review of the moving papers and opinions below reveals that an independent and adequate state ground may exist for the suppression of the derivative evidence, and that such evidence was not excluded on the basis of the federal exclusionary rule.

In Illinois v Gates, U.S. , 103 S.Ct. 2317 (1983), this Court declined to consider the state's argument as to the scope of the federal exclusionary rule because it was not argued below. As Justice Rehnquist stated:

> The state never, however, raised or addressed the question whether the federal exclusionary rule should be modified in any respect, and none of the opinions of the Illinois courts give any indication that the question was considered. (103 S.Ct. at 2323.)

The Gates opinion further noted that:

> absent the adversarial dispute necessary to apprise the state court of the arguments for not applying the exclusionary rule, [the Court] will not consider the question whether the exclusionary

rule should be modified. (id at p.2324).

Under the "not pressed or passed upon below" rule, and the jurisdictional limitations of 28 U.S.C. 1257(3), the state's arguments with respect to the federal exclusionary rule were rejected.

The holding of Gates is equally applicable to the exclusionary rule argument advanced by petitioner in this case. The New York courts were never confronted with the question of whether the derivative evidence should be admitted notwithstanding the Miranda violation because that point was never argued.[11] In its brief, petitioner urges that:

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11 The hearing court did, sua sponte, reach the distinct question of whether or not the subsequent statements were, in fact, derived from the primary illegality. The determination that they were so derived was not an examination of the scope of the exclusionary rule.

> While a statement elicited in violation of Miranda must be suppressed on the authority of Miranda, evidence obtained derivatively therefrom is not per se inadmissible. (citing Tucker). Rather, the nature of the particular violation must be balanced against the intent of making relevant, trustworthy evidence available to the trier of fact [citing Tucker]. In the case at bar, even if it be determined that Officer Kraft acted improperly, there can be no doubt that he did so in good faith and not wilfully or negligently. (Pet. Br. 7-8).

Petitioner, however, never urged any court below to "balance" competing interests or to determine the "good faith", "wilfullness" or "negligence" of Officer Kraft. The lower courts made no finding with regard to these issues because they were not called upon to do so. The courts below never evaluated the degree of coerciveness at the scene because the question was never raised below. There was, therefore, "no real contest" on the issue now before this Court. See Morrison v Watson, 154 U.S. 111, 115 (1894).

In Gates it was argued that the scope of the exclusionary rule need not have been challenged below, since it was settled federal law which the state could have done little to modify, and that therefore, any argument would have been futile. (See the dissent of White, J. at 2338.) Nevertheless, the majority required that a full record be made below before the issue could be considered by this Court. (See Cardinale v Louisiana, 394 U.S. 437, 439 (1969)).

In the case at bar, the failure to assert the question below and the absence of the New York courts' interpretation and findings thereon, are all the more serious. This is so since the question of whether derivative non-testimonial evidence is to be excluded under Miranda is not settled. See Michigan v Tucker, 417 U.S. at 453 n.26 and compare with 460 n.5. In such circumstances this Court should afford the state courts an "opportunity to consider the question

in the first instance". Webb v Webb, 451 U.S. at 500. Illinois v Gates, supra. The state should, as a matter of comity, be the first to "pass upon and correct" alleged violations of federal rights. Picard v Connor, 404 U.S. 270, 275 (1971). This is particularly the case where, as here, there may well exist state law that would pretermit this Court's consideration of the issue. Webb v Webb, supra at 591.

The petition for certiorari submitted herein asserts error in the exclusion of the gun in that "The court below improperly assumed that physical evidence obtained derivatively from a Miranda violation must always be suppressed" (Cert. Pet. 9). In view of the failure to raise the question prior to the petition in this Court, petitioner should not now be heard to blame the lower court for its "assumptions". The New York courts acted appropriately based on the record before them.

Petitioner's failure to raise the exclusionary issue below also undermines the argument it now raises that the suppression of the derivative evidence was based upon a misapplication of federal law. Having failed to make the argument at the suppression hearing, the issue was not preserved for appeal in the New York courts by reason of the state's issue preservation doctrine.[12] Since the issue would have been barred from being considered by the New York appellate courts, had petitioner attempted to raise it, it is well settled that this Court may not now consider the question. Daniels v Allen, 344 U.S. 443, 458 (1953).

Of greater significance, however, is that the exclusion of the evidence in this case may well have been based entirely on state law. The federal

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12 See discussion at Point IV, infra, pp.77-81.

exclusionary rule was not the apparent basis for the suppression. New York's statutory exclusionary rule specifically provides for exclusion of evidence derived from an impermissibly elicited statement. The motion to suppress the evidence in this case was made under the statute, §710.20 of the Criminal Procedure Law. The section provides for the suppression of tangible evidence which is illegally seized, §710.20(1); testimony describing a statement of a defendant obtained involuntarily within the meaning of §60.45,[13] §710.20(3); and evidence which "was obtained as a

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13 Section 60.45(2)(b) provides that any statement which is obtained "in violation of such rights as the defendant may derive from the constitution of this state or the United States is involuntarily made". The failure to give Miranda warnings is a violation under this section. People v Graham, 55 N.Y.2d 144, 149-50 (1982).

result of other evidence obtained in a manner described in subdivisions one...and three", §710.20(4). The decision of the lower court specifically made reference to this section as the basis for the hearing (41a) and then granted the motion to suppress (39a-40a).

It fairly appears that the suppression of the evidence in this case was dictated by the New York statutes. The absence of Miranda warnings was the basis for the determination that respondent's rights were violated, but the scope of the exclusion of evidence was premised upon the application of the state law. The construction of §710.20(4), as to the meaning of "obtained as a result of" other evidence impermissibly obtained, may be disposi- tive of the exclusionary issues petitioner now seeks to raise. Such state statutory construction, unless explicitly mandated by federal law, will not be reviewed by this Court.

Wright, Law of Federal Courts, §107 (4th Ed. 1983); Herb v Pitcairn, 324 U.S. 117, 125-126 (1945).

Other than the initial reference to CPL §710.20 by the hearing court, the state court opinions below make no reference to the authority for excluding the primary or derivative evidence and do not invoke any federal law with respect thereto. This Court, in Michigan v Long, ___U.S. .W., 103 S.Ct. 3469, (1983), has recently noted that where a state court decision "appears to rest primarily on federal law, or to be interwoven with the federal law" a federal question is presented unless the state court specifically indicates an adequate and independent state ground (103 S.Ct. at 3476). However, the total absence of federal authority in the state opinions herein with respect to exclusion, together with the reference to the state statute, does not create a situation in which the exclusion is "primarily" based upon or "so inter-

woven" with federal law as to have properly presented the issue to this Court.

Any uncertainty as to the basis of the exclusion of the derivative evidence is due solely to petitioner's failure to raise the issue below. Had petitioner sought to argue that derivative evidence need not be excluded where a Miranda violation exists, the New York courts would have been called upon to rule on this significant question. Because petitioner waited until this case came before this Court to raise it, however, the issue was not preserved for review. See Illinois v Gates, supra and cases cited therein.

POINT III

SHOULD THIS COURT REACH THE QUESTION OF THE EXCLUSION OF THE DERIVATIVE EVIDENCE HEREIN, THE SUPPRESSION SHOULD BE AFFIRMED

Had the New York Court of Appeals affirmed the original suppression of the derivative evidence in the case at bar on the basis of existing federal law, it would have been correct in doing so. Respondent's initial statement, "the gun is over there", was obtained in derrogation of his Fifth Amendment rights and of the rule established by this Court in Miranda v Arizona, supra. The gun itself was recovered as the immediate and direct consequence of the improperly obtained admission. Immediately following the recovery of the weapon, the officer "read the defendant his rights". Two subsequent admissions, that the respondent owned the gun and that it was purchased in Miami, Florida, were then made in response to the officer's questioning. It was clear, as the suppression court found, that the

initial admission had "let the cat out of the bag". The recitation of the warnings immediately thereafter did not suffice to attenuate the subsequent admissions.

This Court has long adhered to the fundamental principal that "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all". Silverthorne Lumber Company v United States, 251 U.S. 385, 393 (1919), per Holmes J. The application of the exclusionary rule to derivative evidence has been seen not only as a deterrent to lawless law enforcement generally, but as a necessary concommitant to the constitutional rights from which the rule is derived. See, for example, Boyd v United States, 116 U.S. 616 (1886); Weeks v United States, 232 U.S. 383 (1914); Adams v New York, 192 U.S. 585 (1904).

The self-incrimination clause is, by its terms, concerned not just with

the conduct of government agents, but with the source of evidence which may be used in a criminal proceeding against a citizen. Counselman v Hitchcock, supra; Wong Sun v United States, 371 U.S. 471 (1963). In United States v Williams, 401 U.S. 646 (1971) (Brennan, J. concurring). In Bruton v United States, 391 U.S. 123, 141 (1968), Justice White, in his dissent, pointed out:

> It must be remembered that a coerced confession is not excluded because it is thought to be unreliable. Regardless of how true it might be, it is excluded because specific provisions of the Constitution demand it, whatever the consequences for the criminal trial.

The impact of the exclusion of admissions obtained in derogation of the self-incrimination clause would be greatly lessened if, as petitioner urges, evidence derived solely from such admissions could be used in court, as the petitioner and amicus suggest.

The first and fundamental purpose of the exclusion of derivative evidence in the instant context is that it is the only effective way to give substantive meaning to the self-incrimination clause. Amicus concedes that derivative evidence must be suppressed if the initial violation is of the self-incrimination clause of the Fifth Amendment itself (Am.Br. 26-27), and petitioner makes no argument to the contrary. This conclusion is firmly rooted in the values underlying the self-incrimination clause as expressed in Counselman v Hitchcock, supra; United States v Crews, 444 U.S. 463, 471 (1980); Manness v Meyers, 419 U.S. 449, 463 (1975); Harrison v United States, 392 U.S. 219 (1968); United States ex. rel. Hudson v Cannon, 529 F.2d 890, 892-893 (7th Cir. 1976); Parker v Estelle, 498 F.2d 625, 629 (5th Cir. 1974), cert. den. 421 U.S. 963 (1975).

A. The Derivative Evidence Herein Should Be Suppressed Because The Respondent's Fifth Amendment Right Against Self-Incrimination Was Violated

While indisputably in custody in an inherently coercive situation, and without having been made aware of his rights, the respondent was subjected to questioning. As a result of that questioning respondent made incriminating admissions, and divulged the whereabouts of incriminating evidence. In such circumstances, the respondent's Fifth Amendment rights against self-incrimination have been violated and the admissions and evidence must, therefore, be suppressed.

The total failure to provide Miranda warnings, prevents the use of the results of in custody interrogation against the respondent since such use is "a flat violation of the Self-Incrimination clause of the Fifth Amendment as construed in Miranda." Orozco v Texas, supra, 394 U.S. at 327. As this Court stated in the

Miranda decision itself, "the privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner". 384 U.S. at 477.

Both petitioner and amicus rely heavily on Michigan v Tucker, supra, to buttress their argument that the respondent's self-incrimination as a result of the custodial interrogation without the benefit of warnings was no more than a violation of the prophylactic rule of Miranda. The rationale of Michigan v Tucker is, however, inapplicable.

In Tucker, the court first considered "whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right", and only then "whether the evidence derived from this interrogation must be excluded" (417 U.S. at 440). Each facet of the

Court's analysis clearly distinguishes Tucker from the instant case, and suggests that a different result should be reached herein.

As to the question of whether or not Tucker's underlying right against compulsory self-incrimination had been violated, the Court described Miranda as making it clear that "the privilege against compulsory self-incrimination was seen as the principal protection for a person facing police interrogation", and as offering "more comprehensive and less subjective protection than the doctrine of previous cases" 417 U.S. at 443. The Tucker court quoted the Miranda decision at length, including the following:

> In these cases we might not find the defendant's statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest....To be sure the records did not evince overt physical coercion or patent psychological ploys. The fact

> remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statments were truly the product of free choice. (417 U.S. at 444).

The Court went on to evaluate the facts in light of the Miranda requirements and found:

> that the police conduct did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since Miranda. 417 U.S. at 445.

The salient factors of that determination are readily discerned in the opinion. Tucker was, in fact, advised of all the requisite rights except that he had a right to appointed counsel if he could not afford one. The Tucker court characterized this as "an inadvertent disregard of the procedural rules later established in Miranda" (ibid).

The record in the instant case

stands out in stark contrast to that presented in Tucker. Tucker received the substance of each of the Miranda warnings. Respondent herein was not advised of any of his Fifth Amendment rights. Absolutely no safeguards were afforded the respondent to insure that his statement and production of evidence "were truly the product of free choice" (384 U.S. at 457). Respondent was subjected to those circumstances which the court, in Miranda, held to give rise to a presumption of compulsion in the absence of the necessary safeguards. While the respondent was not subjected to the lengthy stationhouse interrogations that the Miranda court examined in detail, he was certainly and suddenly subjected to a police dominated atmosphere with its inherently coercive aspects. It cannot be said on the basis of the record herein, that the respondent's will was not, in fact, overborne when he was surrounded by at least four officers with weapons drawn, handcuffed, frisked, and interrogated as to the location of the

evidence. The total failure of the officers to give the respondent warnings prior to the interrogation signifies that the respondent did not know that he need not respond, that he had a right to counsel or that any response he made could be used to convict him.

Nor can the conduct of the police in this case be characterized, as it was in Tucker, as an inadvertent disregard of procedural rules. At the time of the confrontation between the officers and respondent herein, every law enforcement official in the nation, including Officer Kraft, was fully familiar with the requirements esta- blished in the Miranda decision (19a).

In Tucker, the prosecution was able to demonstrate to this Court's satisfaction that, in the limited circumstances there presented, the police conduct complained of was a violation of a "prophylactic rule" rather than the "constitutional

standards" that Miranda set forth. 384 U.S. at 491. In this case, the prosecution made no such showing. The presumption that compulsion occurred has by no means been dispelled. In fact, amicus concedes that the circumstances of the arrest may give rise to "unprovable compulsion" (Am.Br. 27). In view of the unchallenged presumption of compulsion and the substantial likelihood that the admissions and evidence obtained as a result thereof were not the product of the respondent's free will, the suppression of such admissions and evidence should be affirmed.

Neither petitioner nor amicus argues that the two statements made by respondent were in any way purged of taint by the intervening recitation of Miranda warnings. Petitioner argues, however, that the subsequent statements are admissible under the rationale of Tucker. Tucker does not deal with the admissibility of a defendant's own statements, however, and is therefore inapplicable. As the

New York courts held, the post-warning statements followed almost immediately the improperly elicited admission which let the "cat out of the bag". The subsequent statements should, therefore, be suppressed. See United States ex. rel. B.V. Shelly, 430 F.2d 215, 218 (2nd Cir. 1970); United States v Lee, 699 F.2d 466 (9th Cir. 1980); Brown v Illinois, 422 U.S. 590 (1975).

B. Upon The Facts Of The Instant Case, a Finding of a Miranda Violation Mandates the Exclusion Of Derivative Evidence

Even if the violation herein is only of the Miranda prophylaxsis, the suppression of the derivative evidence should, nevertheless, be affirmed.

The purposes of the exclusionary rule, particularly as applied to the self-incrimination clause, are furthered by the suppression of the derivative evidence herein. As this Court held in Weeks v United States,

232 U.S. 383, 393 (1914):

> Enforced confessions,...often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts...

The admissibility of the evidence derived from a violation of the Miranda rule, the express purpose of which is to protect those constitutional rights by guiding the conduct of law enforcement officials, would constitute just such a sanction.

The "counter-deterrent" effect of such admissibility is immediately apparent. Arresting officers would have every incentive to question a suspect as to the whereabouts of derivative evidence before administering pre-interrogation warnings, particularly where they had reason to believe that such evidence, by virtue of its location or other characteristics, would readily be connected to a suspect.

This issue has been considered in

a variety of lower courts which have held that the fruits of an improper custodial interrogation must be suppressed. See United States v Downing, 665 F.2d 404 (1st Cir. 1981); Parker v Estelle, supra; Commonwealth v White, 374 Mass. 132 (1977), aff'd by an equally divided court, 439 U.S. 280.

In Miranda this Court held that "[u]nless and until such warnings and waiver are demonstrated by the prosectuion at trial, no evidence obtained as a result of interrogation can be used against" a defendant (384 U.S. at 480). This Court has since determined that such language should not be read to mandate exclusion "in every conceivable context". Michigan v Tucker, 417 U.S. at 452; Harris v New York, 401 U.S. 222 (1971). This Court has never suggested, however, that Miranda can be interpreted to mean less than that evidence obtained solely as a direct result of custodial interrogation of a suspect conducted without the required warnings cannot

be used to convict that suspect.

Petitioner proposes that this Court adopt a "good faith" rationale for the admissibility of derivative evidence impermissibly obtained. The argument is not supported by the record, not founded in the law, and would be unworkable in application.

The "good faith" of the arresting officer herein is, at best, an open question, since no one raised the issue prior to the petition in this Court.[14] This Court has made it clear, however, that the protections afforded by the Miranda decision

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14 At the suppression hearing, no one inquired of the officers' motives. The officer's characterization of his activities, though somewhat ambiguous, suggests the possibility that his purpose may indeed have been investigatory: "When I didn't come up with the gun is when I asked him where- when I started to question him". (34a)

should not turn on subjective considerations:

> the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. Rhode Island v Innis, 446 U.S. at 302.

Petitioner's reliance on Michigan v Tucker in this respect is misplaced. The aspect of the officer's good faith upon which the application of the exclusionary rule in Tucker turned, was not the subjective intent of the officer, but his complete compliance with the then prevailing procedures. In the instant case, the arresting officer failed entirely to comply with the procedures mandated by this Court. Whatever the officer's subjective intent, he did not display the sort of good faith which concerned this Court in Tucker.

Petitioner and amicus rely heavily on Tucker as authority for the proposition that any violation of the

Miranda requirement requires only the suppression of a particular statement elicited as opposed to derivative evidence. In Tucker, however, this Court expressly declined to create such a rule.

> Although we have been urged to resolve the broad question of whether evidence derived from statements taken in violation of the Miranda rules must be excluded regardless of when the interrogation took place, we instead place our holding on a narrower ground. 417 U.S. at 448

The narrow ground upon which the Tucker holding rests is not present in the instant case, and the rationale for that holding, as well as this Court's generally held principals, mandate the suppression of the derivative evidence on the facts here presented:

> We consider it significant to our decision in this case that the officer's failure to advise respondent of his right to appointed counsel occurred prior to the decision in Miranda....for at the time respondent was questioned, these police officers

> were guided, quite rightly by the principals established in Escobedo v Illinois, 378 U.S. 478 (1964)...(ibid).

The timing of the interrogation is crucial in light of one of the principal purposes the exclusionary rule has been held to serve: the deterrence of police misconduct. Clearly, where the behavior of the officers involved is entirely in keeping with the standards for such behavior established by this Court, the exclusion of evidence obtained as a result of such conduct, on the basis of an intervening decision, can serve no deterrent purpose. This major element of the Tucker holding is entirely absent in this case, where the police conduct was entirely inconsistent with well-established and uniformly known standards.

Another significant factor in the Tucker decision, was the nature of both the initial admission and the derivative evidence:

> more important, the respondent did not accuse himself. The evidence

> which the prosecution successfully sought to introduce was not a confession of guilt by respondent or indeed even an exculpatory statement by respondent, but rather the testimony of a third party who was subjected to no custodial pressure." 417 U.S. at 450.

On this ground the instant case is most unlike Tucker. The admission elicited by the officer's misconduct was directly incriminating. The derivative evidence was conclusively incriminating, and so closely related to the initial admission as to be virtually indistinguishable from it. The volition of a live witness may well distinguish such derivative evidence from the "non-testimonial" evidence in the case at bar. United States v Ceccolini, 435 U.S. 268 (1978).

Petitioner and amicus implicitly urge upon this Court a two-tiered analysis of Miranda violations. Courts considering Miranda issues would first have to determine whether there had been a custodial interroga-

tion which was not preceded by adequate warnings, and upon such a finding, suppress statements made in answer to that interrogation. A second inquiry would then have to commence for a determination of the good faith of the officer, in the petitioner's formulation, or the lack of actual compulsion, as amicus would have it. Upon a finding of such good faith, or lack of actual compulsion, the content of the suppressed statements, that is the location or existence of the derivative non-testimonial evidence, would by admissible.

Though neither petitioner nor amicus has addressed the questions of burden and standards of proof with respect to this secondary showing, it is clear that an adoption of either's theory in this case would be tantamount to a ruling that the prosecution need not make any showing or meet any standard with respect thereto.

In addition, the application of the novel theories of petitioner and

amicus in this case would mark a significant diminution of the protection afforded citizens not only under Miranda v Arizona, but under the self-incrimination clause, and announce that though the government may not be allowed at trial to specify the source of their information, a citizen may now become the "deluded instrument of his own conviction".

POINT IV

THE DOCTRINE OF INEVITABLE DISCOVERY DOES NOT IN THE CIRCUMSTANCES OF THE INSTANT CASE, RENDER THE IMPROPERLY OBTAINED GUN ADMISSIBLE

The doctrine of "inevitable discovery" was not preserved for appeal in the case at bar, since it was not raised at the suppression hearing. Although the petitioner attempted to raise the issue on appeal, it was not passed upon below by reason of New York's issue preservation rule, and may not now be argued by petitioner. The preservation doctrine constitutes an adequate and independent state ground for the decision rendered by the Court of

Appeals and that decision should therefore not be disturbed.

The New York courts never made findings of fact with respect to whether the gun would have been inevitably discovered nor were the courts called upon to consider whether petitioner met any requisite burden of proof with regard thereto. The inadequacy of the record makes application of this doctrine, upon which this Court has not yet passed, particularly inappropriate in the case at bar.

A. The Doctrine Of Inevitable Discovery Was Not Preserved For Appeal

New York's well settled rule with respect to the preservation and preclusion of issues in the suppression context has been consistently applied in the case at bar. By reason of its failure to raise questions of inevitable discovery at the suppression hearing, the petitioner waived the consideration of such questions at all subsequent stages of the action.

At the suppression hearing, petitioner had ample opportunity to raise the issues related to inevitable discovery, to adduce testimony relevant to the determination of those issues, and to present argument to the fact finder, but failed to do so (36a-37a). Under New York law, where, at a suppression hearing a party fails to raise a particular issue which the trial judge would be called upon to determine, that issue is not preserved for appeal. People v Tutt, 38 N.Y.2d 1011 (1976); People v Martin, 50 N.Y.2d 1029 (1980). The rule enables opposing party to meet and develop at the hearing the appropriate facts and testimony. People v Booker, 49 N.Y.2d 989 (1980); People v Harris, 79 AD2d 615 (2d Dept. 1980); Rentways, Inc. v O'Neill Milk & Cream Co., 308 NY 342, 349 (1955). See also, Criminal Procedure Law §470.05. Petitioner's failure to offer proof regarding inevitable discovery deprived the hearing court of the opportunity to make findings of fact

on relevant questions and deprived respondent of the opportunity to rebut such proof. As a consequence, no record existed upon which the appellate courts could consider the issue.[16]

On appeal to the Appellate Division, the petitioner first raised the inevitable discovery issue. Respondent argued that petitioner had waived the issue, and the Appellate Division affirmed without opinion. That court has fact-finding authority and could have ruled on the inevitable discovery question, "in the interests of justice", but did not do so. The

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16 Under New York law, "great deference" is extended to the determination of the trial court at a suppression hearing, and the appellate court is bound by that determination unless it is unsupported as a matter of law. People v Pooler, 41 A.D.2d 1011 (3d Dept. 1973) aff'd 34 NY2d 772.

Court of Appeals was therefore without jurisdiction to consider the question at all. See People v Ermo, 47 N.Y.2d 863, 865 (1979) (concurrence).

The rejection of the inevitable discovery argument by the appellate courts, sub silentio, can be attributed solely to the failure of the petitioner to preserve the issue for review, since New York has recognized the inevitable discovery doctrine. See People v Fitzpatrick, 32 NY2d 499 (1973), cert. den. 414 U.S. 1050. The argument should also be rejected by this Court.

In Daniels v Allen, supra, 344 U.S. at 458, this Court made it clear that where a "state court judgment rested on reasonable application of the state's legitimate procedural rules" direct review of the federal claims of the petitioner would be barred. See also, Stone v Powell, 428 U.S. 465, 476-7 (1976). This Court has consistently held that where "the highest state court has failed to pass

upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary" Street v New York, 394 U.S. 576, 582 (1969).

As a minimum condition precedent to this Court's review, "there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law" Webb v Webb, supra, 451 U.S. at 501.

The rationale of Webb v Webb, which contains the principles underlying New York's preservation doctrine itself, should clearly be applied to the case at bar.

B. The Doctrine of Inevitable Discovery Should Not Be Applied In This Case

As has been set forth above,

neither the testimony of the arresting officer nor the findings rendered by any court below, contain any reference to the possibility that absent the primary illegality the gun itself would have been recovered. The failure of the petitioner to go forward with respect to an inevitable discovery issue from the outset, has, in addition to the procedural ramifications discussed above, made any meaningful review of the rectitude of the doctrine's application in this case impossible. In short, whether or not this Court chooses to recognize the doctrine, and regardless of the standard which this Court may ultimately deem to be required in such situations, the petitioner cannot be said to have met any burden of proof at all with respect to the inevitable

discovery issue.[17]

The inevitable discovery doctrine provides for the admission of evidence upon a showing that had the illegal source of that evidence not been used, the evidence would have, in any event, been found. It is thus an independent source exception to the inadmissibility of poisoned fruit. People v Fitzpatrick, supra. Justice White, in his dissent to the denial of the writ in Fitzpatrick pointed out that the doctrine is arguably at odds with the prior decisions of this Court,

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17 The issue of whether inevitable discovery should be adopted at all is more fully argued in the case of Nix v Williams now before this Court. Respondent has not yet received a copy of the brief by respondent in that case and reserves his right to join in that argument to the extent that it involves issues similar to those represented herein.

since it is by no means clear that the rationale of Wong Sun can be extended to encompass a hypothetical, as opposed to actual, independent source. 414 U.S. at 1051. While this Court has never reached the issue, it is clear that if improperly obtained evidence is to be admitted despite the exclusionary rule on the basis of the hypothesis that the evidence would have been discovered, there must, at the very least, be a factual showing by the prosecution on which to base the hypothesis. "Inevitable discovery" should be applied, if at all, only where the facts warranting its application have been adduced at trial. The doctrine should not be adopted in this case, which would necessarily eliminate the burden of the prosecution in going forward to prove the admissibility of the evidence in question.

The vast majority of the decisions applying the inevitable discovery doctrine rest on the holding that the

unwarranted speculation which is the greatest danger posed by the doctrine can be avoided by imposing upon the prosecution the burden of proving that the derivative evidence in question would have been discovered in the absence of the primary illegality and by reason of the police procedures which would have been employed in the circumstances or had, prior to the illegality, already been employed. See, e.g., United States v Bienvenue, 632 F2d 910 (1st Cir. 1980); United States v Fisher, 700 F2d 780 (2nd Cir. 1983); Government of the Virgin Islands v Gereau, 502 F2d 914 (3rd Cir. 1974) cert. den. 424 U.S. 917; United States ex rel Owens v Twomey, 508 F2d 858 (7th Cir. 1974); United States v Apker, 705 F2d 293 (8th Cir.1983).

This generally argued rationale was stated in United States v Brookins, 614 F2d 1037, 1048 (5th Cir. 1980) wherein the court held that the application of the inevitable

discovery doctrine:

> The mere assertion of inevitable discovery must fail...police must show that when the illegality occurred [the police] possessed and were actively pursuing the evidence or leads that would have lead to the discovery of the challenged witness and that there was a reasonable probability that the witness would have thereby been discovered. The prosecution must bear the burden of proof on this issue. Maguire, supra at 315; See Brown v Illinois, 422 U.S.590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). The court then must find reasonable probability of subsequent discovery existed based on this showing and the record generally.

The same rationale applies to physical evidence (See Government of Virgin Islands v Gereau, supra) and may be even more stringent in that the exercise of volition which may constitute some portion of an "independent source" determination, cannot be present. See also, United States v Ceccolini, 435 U.S. 268 (1978).

The state's heavy burden on an inevitable discovery showing is also a

clear component of that doctrine under New York law. Thus, in People v Fitzpatrick, supra, 32 NY2d at 508, the Court of Appeals held that:

> the exception may be safely applied and erosion of the salutory exclusionary rule avoided - as long as the prosecution has the burden of proving that the illegal act was not a sine qua non of the discovery of the otherwise tainted evidence.

In Brewer v Williams, 430 U.S. 387 (1977), this Court indicated that the inevitable discovery doctrine may be an exception to the exclusionary rule (see 430 U.S. at p.407 n.12) The Court, this term, granted certiorari in the case of Nix v Williams, supra, which presents the precise question. A comparison of the record and arguments of the United States in Nix and in this case reveals a marked contrast as to the factual sufficiency and legal arguments applicable to the inevitable discovery doctrine, and makes clear the dangers of such a doctrine were it applied herein.

The United States has, in their brief submitted herein, incorporated by reference their brief as amicus in Nix v Williams. (Am.Br. 29) Throughout the Nix brief the prosecution's evidentiary showing is held up as a cure for any infirmities the doctrine suffers. Amicus repeatedly emphasizes in that brief that placing an affirmative burden upon the state to prove that the evidence would have been uncovered, notwithstanding the illegality, would prevent the doctrine of inevitable discovery from being abused. Thus, amicus contends:

> So long as the government is held to a sufficiently strict substantive standard of proof, courts are fully capable of preventing abuse of the doctrine....The prosecution must show the challenged evidence would have been discovered in any event, and not merely that it 'might have' or 'could have' been discovered. (Am.Br. in Nix 8.)

Throughout the brief in Nix, the amicus assures this Court that "the danger of unwarranted speculation can be adequately controlled" if the

prosecution bears the burden of showing by a preponderance that the evidence would have been discovered (id at 7-8) and that "insuring that the government does not profit from the initial illegality can be accomplished by holding the government to a strict standard of proof in inevitable discovery cases" (id. at 20-21).

In the instant case, however, when confronted with a record devoid of any factual showing as to what efforts the police would have made to uncover the gun and without any reference to a burden of proof, the amicus bends its own proposed rule and succumbs to the very speculation against which it warned in Nix.

In this case amicus urges this Court to apply the inevitable discovery doctrine "[a]lthough the lower courts made no findings of fact on the subject..." (Am.Br. 30 n.10) and although there was no proof of what investigatory procedures the police would have undertaken. Amicus employs conclusions such as "undoubtedly",

"presumably" and "virtually inconceivable" with regard to what would have happened to the gun as substitutes for the missing facts (id). Nowhere in this argument does amicus ever suggest that the state has a burden of proof.

The willingness of amicus to disregard in this case the rules it argues in Nix raises a substantial doubt whether abuse of the doctrine of inevitable discovery can be prevented.

By contrast, the record in the Nix v Williams case (at least as appears from the summary thereof in the amicus brief) contains a detailed factual inquiry and finding with respect to the investigatory procedures under way. If this Court is, for the first time, to address the issue of inevitable discovery as a possible exception to the exclusionary rule, it is submitted that it should not be done in this case, where the record furnishes no basis for an informed analysis of two crucial and unsettled

issues: the necessary factual content of the showing and the applicable standard of proof.[18]

A finding of inevitable discovery in this case would immediately establish a rule without the requirement that the state bear an affirmative burden of establishing the factual predicate that the evidence would have been found. In view of the insufficiency of the record and the existing adequate state grounds, it is submitted that this Court should not adopt an "inevitable discovery" exception in this case.

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18 In Brewer v Williams, the court specifically cautioned that under any rule of inevitable discovery, "...it will be for the state courts in the first instance to determine whether particular items of evidence may be admitted" 340 U.S. at 407 n.12. In this case, however, because of the failure of petitioner to present the issue the state courts did not do so.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals of New York should be affirmed.

Respectfully submitted,

STEVEN J. HYMAN
Attorney for Respondent
HYMAN & MINER
24 East 21st Street
New York, N.Y. 10010
(212) 777-8200

WAYNE BRODY
Of Counsel

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